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No. 84-1649

In The

Supreme Court of the United States

October Term, 1984

GARLAND INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners,

v.

STERLING WILKS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I RESPONDENTS' CLAIMS FOR REIMBURSEMENT ARE OUTSIDE THE SCOPE OF THE EDUCATION OF THE HANDICAPPED ACT

Respondents have attempted to characterize the after school help which was offered to Sterling Wilks by Mr. Pat Cox as "private school tuition and related expenses" and "private special education" (Br. in Opp. p. 7). On the contrary, the after school care for Sterling constituted neither private school services nor related services contemplated by the Education of the Handicapped Act (EAHCA) 20 U.S.C. § 1401, *et seq.*, for which reimbursement may be

sought. The custodial care which Mr. Cox rendered is not the type of service which this Court envisaged in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 3048 (1982) as being necessary to "confer some educational benefit upon the handicapped child." In fact, the Petitioners are not required by the EAHCA

> to support a handicapped child in a residential program simply to remedy a poor home setting or to make up for some other deficit not covered by the Act. It is not the responsibility of local officials under the Act to finance foster care as such ... Congress did not intend to burden local school committees with providing all social services to all handicapped children.

Abrahamson v. Hershman, 701 F.2d 223, 227-228 (1st Cir. 1983).

The Fourth Circuit Court of Appeals likewise determined that when a residential program was performing primarily custodial, not educational, functions, it was no longer necessary for the benefit of the handicapped child and should be discontinued. *Matthews By Matthews v. Davis*, 742 F.2d 825 (4th Cir. 1984). In affirming the decision of the District Court, the Court of Appeals favorably noted that the District Court decided not to substitute its judgment for the school system's judgment on methodology under the *Rowley* opinion and cited the following finding of the District Court:

> "... I didn't think [the residential program] was necessary for the custodial care. I think the child had done as well as could be expected, and whatever can be done in the home outside of the school can be done just as easily by his parents, or someone else, in the least restrictive place, which is his home."

Id. at 831. Custodial care is likewise inappropriate for reimbursement in the case at bar.

Furthermore, Mrs. Wilks' unilateral act of providing Sterling with after school hours care was accomplished subsequent to the February 1, 1982 decision of the Impartial Hearing Officer for the Texas Education Agency, which recommended a residential placement for Sterling in order for him to develop to his full potential. The services were also secured without the request for a change in Sterling's Individual Educational Plan (IEP) and without a request for the convening of the Admissions, Review, and Dismissal (ARD) Committee to consider a change in Sterling's educational program. The EAHCA "envisions a cooperative IEP process and prefers a change in placement of a child to occur as a result of agreements between parties." *Town of Burlington v. Dept. of Education for the Commonwealth of Massachusetts*, 736 F.2d 773, 799 (1st Cir. 1984). The First Circuit recognized that there is a

> distinction between a unilateral parental transfer made after consultation with the school system, yet still an action without the system's agreement, and transfers made truly unilaterally, bereft of any attempt to achieve a negotiated compromise and agreement on a private placement.

Id. Therefore, Mrs. Wilks' unilateral provision of custodial care for Sterling after school is not the kind of private school service or related service contemplated by the EAHCA, and should not be reimbursable, and, thus, is not governed by this Court's recent decision in *Burlington School Committee of the Town of Burlington, Massachusetts v. Department of Education of the Commonwealth of Massachusetts*, 105 S.Ct. 1996 (1985). Rather Respondents must

incur this "cost of exercising their freedom to select special care" for Sterling. See *Max M. v. Thompson*, 592 F.Supp. 1437, 1445 (N.D. Ill. 1984).

However, assuming arguendo that Respondents are correct in their allegation that 20 U.S.C. § 1415(e) (3) is inapplicable here because Wilks never changed the placement during the pendency of proceedings, then the Court's opinion in *Burlington School Committee of the Town of Burlington, Massachusetts, supra*, which dealt only with educational placement questions, is not dispositive of Mrs. Wilks' claims for reimbursement for "private school tuition and related expenses". (Br. in Opp. p. 7). Therefore, assuming this action does not involve a change in placement proscribed by 20 U.S.C. § 1415(e) (3), the questions presented in this action are still ripe for this Court's consideration.

II SUMMARY JUDGMENT IS APPROPRIATE

Mrs. Wilks requested residential placement for Sterling on September 18, 1981. Since that time, she now claims reimbursement for after school hours child care for Sterling and "other expenses." (R. 420). Mrs. Wilks failed to specify this claim in her Counterclaim, as required by Fed. R. Civ. P. 9(g) and instead waited until filing her Opposition to Motion for Summary Judgment to make such a claim. (R. 420). In her unsworn affidavit, Mrs. Wilks claims that she hired Mr. Pat Cox in May, 1982 to work with Sterling after school in order to supplement the instruction given to Sterling, (R. 390)[1] although it was not provided in the IEP. Nowhere and at no time has Mrs. Wilks explained why

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[1]The "affidavit" of Victoria Wilks is an unsworn statement and cannot be considered evidence sufficient to establish a genuine issue of fact under Fed. R. Civ. P. 56(e). See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159, 90 S.Ct. 1598, 1609 (1970).

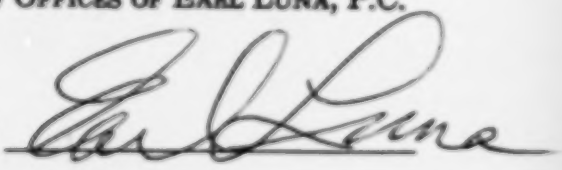
she, as a parent who was qualified to render the after school hours care to Sterling, failed to do so and hired Mr. Cox to do it instead of doing it herself. A judgment must be based specifically and exclusively on the pleadings and proof, *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 581, 91 S.Ct. 1076, 1080 (1971), and the only specific item for which Mrs. Wilks seeks reimbursement is for the services of Mr. Pat Cox, who provided after school hours home care for Sterling, not residential placement services which Mrs. Wilks requested and which were recommended by the Hearing Officer. Therefore, the Respondents failure to plead or prove the necessity for after school hours help provided the District Court with a suitable basis for granting the Petitioners' Motion for Summary Judgment.

CONCLUSION

For the foregoing reasons as well as those stated in their Petition for a Writ of Certiorari, Petitioners pray that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

LAW OFFICES OF EARL LUNA, P.C.

By: 

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CERTIFICATE OF SERVICE

I, EARL LUNA, counsel of record for Petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three copies of the Reply Brief for Petitioners on all parties required to be served by depositing three copies of the Reply Brief for Petitioners in the United States mail, on the 31st day of May, 1985, with first-class postage prepaid addressed to the following counsel of record for Respondents at the address indicated, to-wit: Ms. Diane Shisk and Mr. Reed Martin, Advocacy, Inc., 7700 Chevy Chase Drive, Suite 300, Austin, Texas 78752.

Earl Luna

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